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No. 94-367

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

GEORGE W. HEINTZ and BOWMAN, HEINTZ, BOSCIA & McPHEE,

Petitioners,

v.

DARLENE JENKINS,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY BRIEF ON THE MERITS OF PETITIONERS GEORGE W. HEINTZ and BOWMAN, HEINTZ, BOSCIA & McPHEE

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ARGUMENT

I.

HEINTZ' ARGUMENT IS CONSISTENT WITH THE QUESTION UPON WHICH CERTIORARI IS GRANTED.

Jenkins' brief opens with a question-begging challenge to jurisdiction. She argues that Heintz' admission that on some occasions he acts as a "debt collector" makes this a different case than the issue upon which certiorari was granted (Resp. br. at 7-8). It is only a different issue if

one views the Act's proscriptions as *ad hominem* rather than directed at the conduct at issue. The question certified asks whether an attorney (which Heintz was) engaged solely to prosecute a consumer debt lawsuit (as Heintz was) is subject to the Act. Apparently Jenkins reads the phrase "engaged solely to prosecute litigation" as meaning "engaged solely to prosecute litigation by all clients and on all occasions." The question in this case is whether, under the allegations of the complaint, Heintz was engaged in the collection of a debt when he wrote the letter to Jenkins' counsel. The question is *not* whether in some other cases, unrelated to the allegations in this complaint, Heintz acts as a debt collector. That issue only arises when the defendant argues that he does not *regularly* engage in the collection of debts, which would also exempt him from liability under 15 U.S.C. § 1692a.

II.

THE ACT'S REFERENCES TO LITIGATION DO NOT CLARIFY THE SCOPE OF THE TERM "DEBT COLLECTOR."

Jenkins argues that the Act, by its terms, was intended to apply to litigation. Jenkins confuses provisions restricting the simulation or threat of litigation with the actual prosecution of a lawsuit. Furthermore, in listing all these tangential references to litigation in the Act (Resp. br. at 14-16), Jenkins misses the operative point: all of these provisions were in the Act when attorneys were entirely exempt. Those provisions addressed what *debt collectors* cannot do with respect to debtors. These provisions do not address what attorneys do when litigating a case.

Jenkins' argument regarding the venue provisions in 15 § 1692i misses the point of that proscription. Its connection to "litigation" is the same as all the other tangential connections mentioned in Jenkins' brief. It addresses a specific harassing technique which debt collectors used to put financial pressure on debtors. It has nothing to do with the actual prosecution of consumer debt litigation, i.e., alleging facts in a complaint, preparing a case for trial and enforcing a judgment. It merely addressed an abusive forum choice.

Moreover, like all of the other provisions mentioned by Jenkins, it was enacted at a time when attorneys were exempt from the act. Congress meant to attack *collectors* who used this unsavory tactic. At any rate, its inclusion in the statute when attorneys were exempt does not support Jenkins' argument that the Act was always meant to address "litigation" as such, or at least as conducted by attorneys.

III.

THE LEGISLATIVE HISTORY PLAINLY SUPPORTS HEINTZ' INTERPRETATION OF THE ACT.

Jenkins' discussion of the plain meaning of the Act and its legislative history is all part and parcel of her *ad hominem* misconception of the Act. In footnote 7 on page 17 of her brief, Jenkins cites the distinction between attorneys who sporadically collect claims and those who regularly do, as if those who regularly collect debts are always subject to the Act regardless of the context in which their conduct takes place.

But this argument fails based upon the legislative history cited by Heintz in his original brief and Jenkins' own discussion of legislative history. Heintz' discussion of legislative history, consisting largely of Representative Annunzio's statements, shows that the attorney exemption repeal was *not* meant to brand lawyers as "debt

collectors" regardless of the context of their actions. Representative Annunzio could not have been clearer in establishing the distinction between attorneys acting as litigation attorneys and those doing what debt collectors ordinarily do. Nothing in these remarks suggests a "once a debt collector, always a debt collector" dogma.

Jenkins' own discussion of legislative history on page 17 proves Heintz' point. Her citation to the history addresses abusive *collection* techniques undertaken by attorneys (threats of litigation; simulation of litigation) which they could get away with merely because they were attorneys. These examples never discuss what attorneys do while prosecuting consumer debt litigation.

Jenkins argues that the passage of the Act over Representative Hiler's objections that it would inhibit attorney litigation-related activity shows that the amendment was meant to apply to the prosecution of litigation (Resp. br. at 18-19). Jenkins reads far too much into these comments. An equally plausible inference is that Congress did not think the amendment accomplished the things that Representative Hiler feared, so did not need to address his concerns. This inference is supported by hard evidence—Representative Annunzio's statements relating to the scope of the amendment—as opposed to the mere inference drawn by Jenkins.

All of the discussions in the House Report, quoted on pages 20-21 of Jenkins' brief, are silent with respect to the scope of the term "debt collector." These discussions—of limiting contact with debtors, stopping harassment and requiring validation of debts to avoid errors—addressed the actions of attorneys unrelated to the litigation process. These comments prove Heintz' point: Congress meant to regulate attorneys when they acted as debt collectors. Congress

did not mean to regulate the activities of lawyers as litigators of disputed consumer claims.

Jenkins' discussion of the rejected proposals of the Commercial Law Leagues of America and the American Bar Association fails to persuade for the reasons previously asserted. Congress' refusal to provide a specific exemption for attorneys engaged in litigation does not mean that Congress considered litigation activity as "the collection of a debt." Instead, such a specific exemption was unnecessary in light of Congress' *expressed* concept of the scope of the phrase "collection of a debt." As Representative Annunzio stated on more than one occasion, the Act was not meant to inhibit lawyers engaging in the type of conduct in which Heintz engaged in this case.

Jenkins' objection to Heintz' reliance upon the views of Representative Annunzio and the FTC (Resp. br. at 23-26) also begs the question. The remarks of legislators and agency interpretations cannot vary the *unambiguous* language of a statute. But the phrases "debt collector" and "collection of a debt" are ambiguous as applied to the actions of a litigation attorney, in the context of a statute designed to regulate bill collectors and their law-licensed counterparts. The process of filing a case, preparing it for trial and executing upon the judgment through the courts does not fit hand-in-glove within the ordinary, plain meaning of the phrase "collection of a debt." As argued in the original brief, "collection of a debt" has a certain, undeniable plain meaning. But as applied to litigation activity, which is of a different character than the core object of the Act—the devious and menacing bill collector—it is not so clear. That is why this Court should not hesitate to investigate what Congress really meant to regulate when it deleted the attorney exemption.

Jenkins engages in a demagogic attack on the practice of "debt padding," as if this were the issue in this case. The issue in this case is not whether debt padding by a debt collector violates the Act—it clearly does. The question certified by this Court concerns whether Heintz was acting as a debt collector.

Jenkins' last paragraph on the subject of debt padding is quite confusing (Resp. br. at 29). She suggests that "under Heintz' view neither a collection agency nor an attorney could demand excessive charges outside litigation." That is not Heintz' view. If a debt collector demands a charge not authorized by the debtor's agreement with the creditor, he may violate the Act. If a creditor hires an attorney, who does the same thing in a dunning letter or telephone call to the debtor or the debtor's attorney, the attorney may violate the Act. But if an attorney is engaged by his client to collect a sum which is not authorized by the contract, the complaint he files is not subject to the Act. Rather, the attorney is subject to state law tort remedies or court-ordered sanctions if the litigation is frivolous or brought for the improper purpose of collecting a claim which the lawyer knows is improper. But there is nothing in the legislative history to suggest that Congress intended to burden litigation attorneys with a strict liability statute for filing a lawsuit which the client advises is consistent with the debtor's contractual obligations. The legislative history suggests the precise opposite, as evidenced by Representative Annunzio's statements.

Much of the remainder of Jenkins' brief is a polemic against the supposed evil inflicted upon her and other consumers by collection attorneys. Mixed in with that attack is yet another distortion of the plain meaning of the legislative history of the repeal of the attorney exemption. Jenkins cites from the House Report "the current law does not adequately protect consumers from attorney *debt collection* abuse (emphasis added)." Note that the report does not say "attorney abuse" or "lawsuit abuse" or "collection litigation abuse." Rather, the statement must be viewed in the context of the whole report, which addresses the problem of attorneys' doing the same things as ordinary debt collectors, but evading liability due to their blanket exemption.

In summary, Congress sought to address a specific evil when it eliminated the complete exemption of attorneys from the definition of "debt collector." The legislative history and administrative interpretation of this amendment answer the question that the definition of "debt collector" leaves open: Congress did not intend the Act to apply to attorneys whose sole function was to prosecute a lawsuit and reduce a consumer debt to judgment. The legal system already imposes significant punishment for abusive litigation conduct; consequently, there is no need to extend the definition of "debt collector" to activity it was not intended to cover.

CONCLUSION

For these reasons, petitioners respectfully request that this Court reverse the judgment of the United States Court of Appeals for the Seventh Circuit, and reinstate

the judgment of the United States District Court for the Northern District of Illinois.

Respectfully submitted,

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